Supreme Court, U.S.
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No. 00-226

In The

Supreme Court of the United States

MICHAEL BONDS,

Petitioner,

v.

MILWAUKEE COUNTY, et al.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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STATEMENT OF THE CASE

In 1997, Michael Bonds applied for the position of Policy Research Analyst for the Milwaukee County Board of Supervisors. As Bonds has conceded, the research analyst position is a "policymaking" position as defined by the federal courts, meaning there is a heightened need for trust, confidence and loyalty in such employees. During his interview with County Board Chairman Karen Ordinans, Bonds stated that he understood the role of a research analyst, and that "he knew that whether he agreed or disagreed with a decision made by the County Board, that it was not his place to publicly comment on it or get into it." *Bonds v. Milwaukee County*, 207 F.3d 969, 974 (7th Cir. 2000) (App. 3). Bonds was offered the position, and accepted on July 25, 1997. He was scheduled to commence work at Milwaukee County on August 11, 1997.

At the time, Bonds was working for the City of Milwaukee as a senior fiscal analyst for the City's Community Development Block Grant Committee. On July 25, 1997 (the same day Bonds accepted the Milwaukee County position), the City of Milwaukee Common Council adopted a new method of distributing community development block grant funds (the "NSPP"), of which Bonds had been highly critical in his position as an analyst. The following day, July 26, 1997, Bonds appeared at a public forum and harshly criticized the Common Council's decision, characterizing the NSPP as "sinister," suggesting opponents should be "raising hell" at City Hall, and suggesting a possible recall of the Mayor if the plan was not vetoed. *Bonds*, 207 F.3d at 974 (App. 3-4). Bonds' comments were reported the following day on the

front page of the Metro section of the Milwaukee Journal Sentinel, Milwaukee's major daily newspaper.

As found by both lower courts, Bonds' comments "sparked immediate outrage at Milwaukee County." *Id.* at 974-75 (App. 4-5); (R-App. 10-11).[1] Three Supervisors objected to Bonds' hiring and indicated a reluctance to work with him. Chairman Ordinans was "very shocked" by Bonds' conduct. She had "hired Bonds for the trusted analyst position believing that Bonds would be discreet and reserve his personal misgivings from public attention." *Id.* at 975 (App. 5). When Ordinans' Chief of Staff William Hart called Bonds to investigate the matter, Bonds admitted that the "main thrust" of the newspaper article was correct. Bonds then faxed to Hart copies of apologies he was sending that day to Mayor John O. Norquist and the Milwaukee Common Council.

In light of the strong objections of several County Supervisors, and her own misgivings about Bonds' loyalty and trustworthiness, Chairman Ordinans concluded that hiring Bonds would be a "disaster." After determining that Bonds could keep his City position, Ordinans withdrew Bonds' job offer with the County.

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[1] Contrary to Supreme Court Rule 14(1)(i), Petitioner's Appendix did not include the transcript of the District Court's April 20, 1999 oral decision granting judgment to Milwaukee County. For the Court's convenience, a copy of that transcript is appended to this response brief as "R-App."

REASONS FOR DENYING THE WRIT

Bonds attempts to cast the Seventh Circuit's decision as mandating a "categorical" approach when a policymaking employee is involved in a *Pickering* balancing analysis. The plain language of the opinion belies this assertion; the Seventh Circuit properly applied the balancing analysis of *Pickering v. Bd. of Education*, 391 U.S. 563 (1968), noting that an employee's "policymaking" status weighs on the government's side of the scale because of the heightened need for loyalty and confidentiality from such employees.

The real thrust of the Petition is that the lower courts misapplied the facts when they concluded that Milwaukee County reasonably believed that hiring Bonds would be disruptive. Generally, the Court will not grant a petition for certiorari on these grounds. In addition, Bonds misstates or ignores crucial facts in presenting his argument.

I.

THE PETITION MISSTATES OR IGNORES CRITICAL FACTS FOUND BY THE LOWER COURTS

Bonds contends that when he spoke at the Community Brain Storming forum on July 26, 1997, he "did exactly what his boss, Alderman Gordon, asked and expected him to do." *Pet.* at 7. This assertion, repeated throughout the Petition, *Pet.* at 19, 23, 27 and 28, was expressly rejected by the Court of Appeals:

> To begin, we address Bonds' challenge to the following district court findings of fact: (1)

> Bonds's comments created substantial disruption for the City; (2) Alderman Gordon viewed Bonds's comments as inflammatory and inappropriate and requested an apology from Bonds . . .
>
> Bonds contends that [these] findings are unsupported by the record, but both derived directly from the deposition testimony of Alderman Gordon. Gordon explained unequivocally in his deposition that Bonds' comments were absolutely inappropriate and sparked a "firestorm" of outrage that besieged him with phone calls for several days. Although Gordon did not testify that he demanded an apology, Gordon asked Bonds to explain himself, and Bonds immediately apologized for his remarks at the forum.

Bonds, 207 F.3d at 976 (App. 7-8).

Bonds also suggests that Milwaukee County engaged in little or no investigation, and that there were no reasonable bases for Milwaukee County's decision to withdraw the job offer. *Pet.* at 8, 26-29. Bonds fails to inform the Court about the apologies he sent to Mayor Norquist and the City of Milwaukee Common Council, which he faxed to Milwaukee County when it investigated his comments. Again, the Seventh Circuit rejected Bonds' challenge to these findings:

> Regarding the third finding of fact, Bonds argues that Bonds's letters to the Common Council and Mayor Norquist were not "apologies," but rather, clarifications of his comments at the July 26 forum. Bonds's private intent notwithstanding, the district court reviewed the letters and found that these letters, which express

> Bonds's regret for his conduct at the forum, constituted apologies to the Council and the Mayor. This was not clear error.

Bonds, 207 F.3d at 976 (App. 8).

II.

THE PRIMARY BASIS FOR THE PETITION IS THAT THE LOWER COURTS MADE ERRONEOUS FACTUAL FINDINGS AND MISAPPLIED THE LAW

As set forth in section III below, the Court of Appeals correctly stated the constitutional standards which control the *Pickering* analysis. Bonds simply disagrees with the application of those standards to the facts established at trial.

Rule 10 of the Supreme Court Rules states: "A Petition for a Writ of Certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." According to Justice Holmes, the Court "do[es] not grant a certiorari to review evidence and discuss specific facts." *United States v. Johnston*, 268 U.S. 220, 227 (1925). This policy is applied with "particular rigor when the district court and court of appeals are in agreement as to what conclusion the record requires." *Kyles v. Whitley*, 514 U.S. 419, 456-57 (1995) (Scalia, J., Dissenting). Under this standard, the Petition should be denied.

A. The *Pickering* Balancing

Bonds asserts in section B of the Petition that the *Pickering* balancing "should have been decided in Bonds's

favor." *Pet.* at 13. Bonds attempts to analogize the facts of this case to the facts in *Pickering* arguing that, like Mr. Pickering, the balancing should weigh in his favor. In this manner, Bonds asserts that the Seventh Circuit's decision is "inconsistent with *Pickering*." *Pet.* at 15.

This misconstrues the most fundamental aspect of *Pickering*, which is that each case must be weighed upon its own facts. Citing the "enormous variety of fact situations in which critical statements by . . . public employees" may be thought to furnish grounds for dismissal, the Court did not "deem it either appropriate or feasible to attempt to lay down a general standard against which all such statements may be judged." *Pickering*, 391 U.S. at 569. Lower courts are thus entrusted to apply the appropriate *Pickering* factors to the unique facts of each case. That is precisely what occurred here.

Moreover, this case is not factually analogous to *Pickering*. Milwaukee County presented evidence that Bonds had severely damaged the confidence and loyalty required for a research analyst. (App. 19-20). By contrast, in *Pickering*, "[n]o evidence was introduced at any point in the proceedings as to the effect of the publication of the letter on the community as a whole or on the administration of the school system in particular, and no specific findings along these lines were made." *Pickering*, 391 U.S. at 567.

B. The Reasonableness of Milwaukee County's Investigation

In section C of the Petition, Bonds argues that Milwaukee County did not conduct a "reasonable" investigation into the context of Bonds' speech, and that the County's "judgment" that hiring Bonds would be disruptive was based upon "rank speculation" and was "wrong." *Pet.* at 21-29.

This discussion amounts to little more than a mischaracterization of the evidence presented at trial and an assertion that the lower courts misconstrued the evidence. Contrary to Bonds' assertions, the County did not base its decision on "knee jerk" reactions or "gut feelings." *Pet.* at 28. The District Court and Court of Appeals carefully examined the evidence and concluded that the County presented compelling evidence of the reasonableness of its investigation and decision, including testimony that several County Supervisors were unwilling to work with Bonds, that Bonds' comments were directly contrary to prior statements he made to Chairman Ordinans during his job interview, that Bonds' comments caused a "firestorm" of outrage at the City, and that Bonds was forced to apologize to the Mayor and Common Council. *Bonds*, 207 F.3d at 982 (App. 19-20); (R-App. 10-11).

The bottom line, however, is that such arguments are, and were, properly addressed to the lower courts. Bonds' disagreement with their conclusion does not support the granting of certiorari.

III.

THE SEVENTH CIRCUIT CORRECTLY STATED THE LEGAL STANDARDS CONCERNING THE POLICYMAKER EXCEPTION AND THE *PICKERING* BALANCING ANALYSIS

A. An Employee's Status as a Policymaker Speaks Directly to the *Pickering* Factors Concerning the Government's Interest in Maintaining Efficiency and Avoiding Disruption.

Bonds is correct that this case involves the confluence of two lines of First Amendment jurisprudence: the *Elrod/Branti* line of cases, which establish that a "policymaking" employee can be disciplined based upon party affiliation; and the *Pickering* balancing analysis, which weighs the employee's interest in speaking on a matter of public concern against an employer's interest in promoting the efficiency of its public services. *See Elrod v. Burns*, 427 U.S. 347 (1976), *Branti v. Finkel*, 445 U.S. 507 (1980), and *Pickering v. Board of Education*, 391 U.S. 563 (1968). Bonds is wrong, however, in asserting that the Seventh Circuit grafted the "policymaker" exception onto the *Pickering* analysis, creating a "categorical" test by which a policymaking employee will always fail in a *Pickering* balancing analysis. *Pet.* at 11. In fact, the Seventh Circuit declined to apply the policymaker exception, but correctly concluded that the policymaking nature of Bonds' position speaks to the government employer's interests under the *Pickering* balancing analysis.

The Seventh Circuit began its analysis by expressly declining to apply the categorical "policymaker" exception to this case: "The policymaking employee exception

does not immunize public employer action unconnected to and unmotivated by the need for political loyalty." *Bonds*, 207 F.3d at 979 (App. 13). Concluding that "Bonds was not hired because county executives believed he was disloyal and indiscreet," the Court held these are not the type of "political" reasons warranting application of the policymaker exception. *Id.*[2]

The Seventh Circuit then conducted the *Pickering* balancing analysis. First, the Court found that Bonds' speech involved a matter of public concern.[3] The Court then considered the second prong of *Pickering*: whether Bonds' interest in speaking outweighed "the County's interest in government efficiency and workplace harmony." *Bonds*, 207 F.3d at 981 (App. 16). It was at this point the Court of Appeals held that the "policymaking" analysis became relevant to the balancing.

---

[2] Milwaukee County argued below that its reasons for withdrawing the job offer, including Chairman Ordinans' concerns about Bonds' loyalty and her objection to the racial divisiveness of Bonds' comments, were "political" in nature and warranted application of the policymaker exception under the reasoning of *Warzon v. Drew*, 60 F.3d 1234 (7th Cir. 1995).

[3] Milwaukee County conceded that the substance of Bonds' comments involved a matter of public concern, but argued that the first prong of *Pickering* requires that the employee be speaking in his or her role "as a citizen" rather than "as an employee." *See, e.g., Wallace v. Texas Tech Univ.*, 80 F.3d 1042, 1050 (5th Cir. 1996). The Seventh Circuit disagreed, concluding that the "as a citizen" language is "shorthand" for the expression of "personally held views regarding a public concern," and does not refer to whether the employee was speaking as part of his or her job. *Bonds*, 207 F.3d at 979-80 (App. 14-15).

As the Court of Appeals explained, *Pickering* requires the Court to consider, among other things, "whether the speech would create workplace dissension; whether the employment relationship requires heightened personal loyalty and confidence; and whether the speech impeded the employee's ability to perform his responsibilities." *Id.* at 981 (App. 18); *see also Rankin v. McPherson*, 483 U.S. 378, 388 (1987) (setting forth these and other factors). The Seventh Circuit held that the policymaking nature of the position "speaks to each of these factors" because the "special loyalty and confidentiality" needed from such employees "exacerbates the damage to the employment relationship and government effectiveness caused by their insubordinate, disloyal or inappropriate speech." *Bonds*, 207 F.3d at 981 (App. 18).

This formulation of the controlling constitutional standards is wholly consistent with *Pickering* and its progeny, which specifically recognize that the nature of the plaintiff's position impacts upon the employer's interests. In *Pickering*, the Court discounted the government's interests because plaintiff's relationships with defendants did not require "personal loyalty and confidence." 391 U.S. at 570. In *Connick v. Myers*, 461 U.S. 138, 151-52 (1983), the Court emphasized that "[w]hen close working relationships are essential to fulfilling public responsibilities, a wide degree of deference to the employer's judgment is appropriate." Finally, in *Rankin*, the Court held that "pertinent considerations" in a *Pickering* balancing include whether the speech "has a detrimental impact on close working relationships for which personal loyalty and confidence are necessary." 483 U.S. at 388.

B. The Seventh Circuit Correctly Held that Policymaking Employees Have Less First Amendment Protection than Non-Policymaking Employees.

Bonds complains that the Seventh Circuit created an unacceptable standard that "a public employee's free speech rights are inversely related to the value of the information that employee can impart to the public." *Pet.* at 12. According to Bonds, this violates the "core principle" expressed by the Court that the First Amendment should promote and facilitate "self government." *Id.* To the contrary, in *Rankin*, a case not cited by Bonds, the Court created the "inverse" standard of which Bonds complains:

> The burden of caution employees bear with respect to the words they speak will vary with the extent of authority and public accountability the employee's role entails. Where, as here, an employee serves no confidential, policy-making, or public contact role, the danger to the agency's successful functioning from that employee's private speech is minimal.

Rankin, 483 U.S. at 390-91. This principle has been widely accepted by other Courts of Appeal. *See, e.g., McEvoy v. Spencer*, 124 F.3d 92, 103 (2d Cir. 1997) (" '[T]he more the employee's job requires confidentiality, policymaking, or public contact, the greater the state's interest in firing her for expression that offends her employer.' ") (citation omitted); *McVey v. Stacy*, 157 F.3d 271, 278 (4th Cir. 1998) (a policymaking employee "enjoys substantially less First Amendment protection than does a lower level employee"); and *Bates v. Hunt*, 3 F.3d 374, 378 (11th Cir. 1993) ("For some categories of employees such as those in

a confidential or policy-making relation to their public employer, First Amendment constitutional protection is often slight.").

C. There is No Split in the Circuits.

Bonds argues that the decision herein creates a split with the D.C. Circuit, which held that "[a]t a minimum, the employee's speech must relate to policy areas for which he is responsible." *Hall v. Ford*, 856 F.2d 255, 264 (D.C. Cir. 1988). This language was dicta, however, as the plaintiff's speech in *Hall* directly addressed policy areas for which he was responsible. *Id.* The actual test established in *Hall* is consistent with the Seventh Circuit's analysis: if the employee is a policymaker, "we ask whether the government interest in accomplishing its organizational objectives through compatible policy level deputies is implicated by the employee's speech." *Id.* This is precisely what the Seventh Circuit concluded: "Bonds's speech rightly troubled the County because it had undermined his credibility with several supervisors, and Ordinans reasonably believed that his hiring would have created workplace dissension." *Bonds*, 207 F.3d at 982 (App. 19).

Bonds next asserts that the Seventh Circuit decision "conflicts with" decisions of other circuits because all courts to have considered policymaking factors in a *Pickering* balancing have done so in the context of employee speech "contrary to the employer's decision, action, or policy in a particular area." *Pet.* at 18-21. While this

factual distinction may highlight the unusual factual context of this case, it does not relate to the ultimate question: whether the comments implicated the employer's interests in efficiency. Bonds points to no case in which a court hinged its decision on the nexus between the speech and the government employer's policies, as opposed to its actual or potential detrimental impact on the employer.

In fact, all of the cases cited by Bonds agree with the Seventh Circuit that an employee's policymaking status weighs heavily in favor of the government's interests in a *Pickering* balancing. For example, in *Gonzales v. Benavides*, 774 F.2d 1295, 1300 (5th Cir. 1985), *cert. denied*, 475 U.S. 1140 (1986), the Fifth Circuit held that the *Elrod/Branti* analysis was, by analogy, a factor in assessing the government's interests in a *Pickering* balancing analysis. The Court was careful to note:

> Our analogy does not conflate the categorical approach of the political affiliation cases with the individualized balancing required in employee speech cases. We simply identified an additional government interest to be weighed in the balance. This court has since viewed employee speech and employee party affiliation as endpoints on a single continuum.

Id. at 1300 n.9. This analysis mirrors the Seventh Circuit's observation that "[t]he policymaking employee exception represents a subset of *Pickering* cases where the government employer's need for political allegiance from its

policymaking employees outweighs the employee's freedom of expression to such a degree that it obviates *Pickering* balancing." *Bonds*, 207 F.3d at 981 (App. 18).

Even more to the point, in *Barker v. City of Del City*, 215 F.3d 1134 (10th Cir. 2000), the Court specifically adopted the Seventh Circuit's analysis that " 'an employee's status as a policymaker bears considerable attention when weighing the interests of the government. . . . ' " *Id.* at 1139, *quoting Bonds*, 207 F.3d at 979. *See also Lewis v. Cohen*, 165 F.3d 154, 162, 165 (2d Cir. 1999), *cert. denied*, 120 S.Ct. 70 (1999) ("the *Pickering* balancing is affected by the nature of the disciplined employee's responsibilities"); *Moran v. State of Washington*, 147 F.3d 839, 846 (9th Cir. 1998) ("[T]he State's interest in avoiding disruption is magnified when the employee asserting the right serves in a 'confidential, policymaking, or public contact role.' ") (*quoting Rankin*, 483 U.S. at 390-91); *Flynn v. City of Boston*, 140 F.3d 42, 44 (1st Cir.), *cert. denied*, 525 U.S. 961 (1998) ("positions are less likely to be protected to the extent they are 'higher,' more 'political,' more 'confidential,' and so on"); *McEvoy*, 124 F.3d at 103 ("[T]he Supreme Court has ruled that the policymaking status of an employee is relevant to the *Pickering* analysis . . . . "); *Weisbach v. County of Los Angeles*, 119 F.3d 778, 783-84 (9th Cir. 1997) (speech by "high-level employee" would "necessarily impair" the employer's confidence in the employee's loyalty); *Rash-Aldridge v. Ramirez*, 96 F.3d 117, 119-20 (5th Cir. 1996) (noting the "unique governmental interest in securing the relationship" between policymaking employees and the elected officials they serve); and *Kinsey v. Salado Indep. Sch. Dist.*, 950 F.2d 988, 994 (5th Cir.) (en banc), *cert. denied*, 504 U.S. 941 (1992)

("[C]ases involving public employees who occupy policymaker or confidential positions fall much closer to the employer's end of the spectrum, where the government's interests more easily outweigh the employee's (as a private citizen).").

In light of this uniform recognition of the interrelationship between the *Pickering* public speech analysis and the *Elrod/Branti* policymaker analysis, the assertion of a split in the circuits is hollow.

What Bonds is really arguing in this Petition is his own version of a "categorical" test for certain First Amendment cases. According to Bonds, if a public employee's speech does not relate to the policies of the governmental employer, the government's interests in efficiency can *never* be implicated. That is, the second prong of *Pickering* is a nullity if the speech does not relate to specific policies of the employer.

Such a categorical test has no basis in either *Pickering* jurisprudence or logic. The Court has never suggested that the government's interest in efficiency and avoiding disruption can only be implicated by speech directed at the government employer's policies. The *Pickering* factors relating to the government employer's interests – specifically, whether the speech "has a detrimental impact on close working relationships for which personal loyalty and confidence are necessary, or impedes the performance of the speaker's duties or interferes with the regular operation of the enterprise," *Rankin*, 483 U.S. at 388 – are not limited in any principled way to speech directed to the government's policies. As amply demonstrated by

this case, speech not directly addressing the employer's policies can directly impact working relationships and impede the performance of the speaker's duties.

As a result of Bonds' comments, several County Supervisors "reasonably believed that his hiring would have created workplace dissension," and the County Board Chairman concluded Bonds was "untrustworthy and disloyal" because he had "embarrassed his employer in explicit and provocative terms." *Bonds*, 207 F.3d at 982 (App. 19). It is of no constitutional moment that the speech giving rise to the potential disruption involved the policies of the City of Milwaukee rather than Milwaukee County; the potentially disruptive impact ensued from the extreme manner in which Bonds castigated his governmental employers, not from the specific target of his speech. An employer is certainly permitted to predict future conduct based on prior conduct. *See Connick*, 461 U.S. at 152. There is thus no principled basis for Bonds' proposed artificial, bright-line distinction between speech related to and unrelated to the employer's policies.

D. The Seventh Circuit Properly Applied the Standard of *Waters v. Churchill*.

Bonds' final attempt to identify a proper issue for certiorari is the assertion that the Seventh Circuit's decision is "contrary" to *Waters v. Churchill*, 511 U.S. 661 (1994). This argument devolves, however, to a factual disagreement regarding the "reasonableness" of the County's investigation and a groundless accusation that the County's decision was based on "rank speculation."

Waters does not mandate any specific level of investigation by a governmental body when it disciplines an employee: "We must therefore reconcile ourselves to answering the question on a case-by-case basis, at least until some workable general rule emerges." *Waters*, 511 U.S. at 671. The *Waters* Court established the analytical framework within which governmental assertions of harm will be reviewed, beginning with the following guidepost:

> [W]e have consistently given greater deference to government predictions of harm used to justify restriction of employee speech than to predictions of harm used to justify restrictions on the speech of the public at large. Few of the examples we have discussed involve tangible, present interference with the agency's operation. The danger in them is mostly speculative. . . . But we have given substantial weight to government employers' reasonable predictions of disruption, even when the speech involved is on a matter of public concern . . . .

Id. at 673. The Court clarified that such decisions are not subject to the same type of review as a judicial proceeding, and that governmental employers are free to rely on hearsay, past conduct and their own subjective knowledge of a person's credibility. *Id.* at 676. A reviewing court must look to "the facts as the employer *reasonably* found them to be." *Id.* at 677. *See also Board of County Comm'rs v. Umbehr*, 518 U.S. 668, 677 (1996) ("*Pickering* requires a fact-sensitive and deferential weighing of the government's legitimate interests.").

The Seventh Circuit's analysis is wholly consistent with this standard. The Court expressly examined the

facts as Milwaukee County "reasonably believed" them to be, and gave "substantial deference" to Milwaukee County's predictions of harm. *Bonds*, 207 F.3d at 982-83 (App. 19-20). The Court analyzed the actual evidence submitted by Milwaukee County, which showed that Bonds had "undermined his credibility with several supervisors," and that Chairman Ordinans considered Bonds "to be untrustworthy and disloyal." *Id.* at 982 (App. 19). As to the County's investigation, the Court found the County's conclusions to be reasonably based upon "the newspaper report, Hart's [Ordinans' Chief of Staff] telephone discussion with Bonds and Bonds' written apologies to Mayor Norquist and the Council." *Id.* (App. 20).

CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

MICHAEL BONDS,

Plaintiff,

Civil No. 97-C-0921

vs.

MILWAUKEE COUNTY,

Defendant.

TRANSCRIPT OF DECISON OF THE COURT

Record made in the above-entitled matter before the Honorable J. P. Stadtmueller, Judge of said Court, on April 20, 1999, commencing at 8:32 a.m.

APPEARANCES

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MR. ROBERT FRIEBERT and MR. MATTHEW O'NEILL, of Friebert, Finerty & St. John, SC, 330 E. Kilbourn Avenue, suite 1250, Milwaukee, WI 53202-3146 on behalf of the Defendant.

* * *

[2] PROCEEDINGS

THE CLERK: The court calls case number 97-C-921 for the reading of a verdict. May I have the appearances, please, beginning with the plaintiff's counsel.

MR. BAUMAN: Appearing on behalf of the plaintiff, Attorney Robert J. Bauman.

MR. O'NEILL: Appearing on behalf of the defendant, Milwaukee County, Matthew O'Neill and Robert Friebert of Friebert, Finerty & St. John.

THE COURT: Good morning, Mr. Bauman. Good morning to you, Mr. Bonds. Good morning to you, Mr. Friebert, Mr. O'Neill, and good morning to you, Ms. Ordinans.

As I indicated at the conclusion of our trial day yesterday, the court took the opportunity last evening to consider not only a review of the testimony that was presented yesterday but all of the exhibits to which the court had some degree of familiarity with most of them given the fact that this court has on two prior occasions dealt with the underlying facts in the context of a Motion for Summary Judgment that was addressed in a written decision by the court back on April 20th of last year, in fact a year ago to the day, as well as a second motion made to dismiss the individual defendants that was addressed in a written decision by the court on December 7th of last year in which I found that the individual named defendants, Karen Ordinans, William Hart and [3] Thomas Kuzma, were all immune from the claims of the plaintiff.

My purpose this morning is not to redigest all of the issues that the court did address in the prior rulings, but to begin with a comment that I made during one of our colloquies yesterday; and that is, as a consequence of the parties refocusing on the matter of Mr. Bonds' status, while I am not at all certain that it would have been appropriate for the court to grant summary judgment on either side of the issue in April of 1998, the cases of

Marquez v. Turnock and to a lesser extent *Youker v. Schoenenberger,* both of which are Seventh Circuit cases, the first one 967 F.2d 1175 written by Judge Cudahy back in 1992 and a succeeding case *Youker v. Schoenenberger,* 22 F.3d 163, a Seventh Circuit case from 1994 authored by Judge Coffey, cause the court and I think frankly defendant's counsel to address in a more pointed way the matter of whether or not the comments of Mr. Bonds at the meeting back in July of 1997 were made as a city employee or as a private citizen because seemingly under the *Pickering* analysis, namely, *Pickering v. Board of Education,* 391 U.S. 563, and its successor line of cases, including several from the Seventh Circuit, but *Connick v. Myers,* 461 U.S. 138; *Wilbur v. Mahan,* 3 F.3d 214, a Seventh Circuit case from 1993; *Marshall v. Porter County Planning Commission,* 32 F.3d 1215, again a Seventh Circuit case from 1994; and [4] *Warzon v. Drew,* 60 F.3d 1234, all in their own way address the factual underpinnings of a particular set of comments or reports authored by citizens or employees of various governmental agencies. And what the court is struck with, of course, in all of these underlying cases is that they are intensely fact driven; and in no small measure this case is similarly intensively fact driven.

And we come this morning to address whether or not Mr. Michael Bonds' comments at the Community Brainstorming Forum on Saturday, July 26th of 1997 were constitutionally protected under the First Amendment subjecting Milwaukee County as the remaining defendant in this case to damages for having withdrawn a previously made and accepted offer of employment to Mr.

Bonds to serve as a policy research analyst with Milwaukee County.

Now, as the court has indicated in the context of the Motion for Summary Judgment, that issue was not resolved. Similarly, as to Milwaukee County it was not resolved as to the qualified immunity argument since that pertained only to the individual named defendants in Mr. Bonds' action.

So the question I think is now framed as to whether or not the facts and the applicable law within the parameters that the court has framed it requires that Mr. Bonds be allowed to recover the stipulated damages in this case, namely, $5,000 for wages and an agreed sum of $20,000 for compensatory [5] damages.

The court's analysis begins where the Motion for Summary Judgment and the qualified immunity orders that I previously addressed left off. From what the court has gleaned from listening to some 13 or 14 witnesses yesterday in substance really does not take quarrel with the facts that the court had before it in the context of the Motion for Summary Judgment. Some of the matters were more clearly focused, but in the main there really was not an awful lot in terms of core facts that differed from counsel's presentations during the summary judgment stage and the qualified immunity argument.

Rather than deal extensively with those facts in the context of my ruling this morning, I'm simply going to reference the facts that were addressed in my prior rulings; and by the same token I am prepared in order to put the record in a more complete state to adopt each of the

factual statements that have been submitted by the defendant as Proposed Findings of Fact.

And in that regard I would note parenthetically that although the facts as submitted by the defense in their Proposed Findings of Fact have been adequately referenced in the exhibits together with the testimony of various witnesses, since the court did not have the benefit of the testimony of Mr. Fred Gordon or Marilyn Figueroa, whose testimony is suggested in support of several of the numbered Proposed [6] Findings of Fact which in total number 22, I would simply note that although those two witnesses did not testify, there is ample other evidence in the record to support each of the Proposed Findings of Fact and Conclusions of Law, whether it be the exhibits that were received or the actual testimony of other witnesses.

Based upon those facts, and in accordance with the court's application of the law, I am constrained to conclude in this case that for purposes of the *Pickering* analysis, Mr. Bonds at the time he spoke to the Community Brainstorming Forum on January – strike that, on July 26th of 1997 was acting as a public employee and not as John Q. Citizen. I make that conclusion in light of the testimony and exhibits that were received, most notably the program itself as outlined in Exhibit No. 9 in which Mr. Bonds is identified as a community development policy committee analyst.

Now, it doesn't say the City of Milwaukee, but the court need not leave common sense at the doorstep in coming into the courthouse to conclude that all of the five speakers who were present at the Saturday, July 26th,

forum were in fact City of Milwaukee employees, and the subject of the forum on that occasion was community block grants.

And while Mr. Bonds attended this forum at the request of an alderman who had requested that he appear on his behalf, that is, the Alderman's behalf, the fact remains that [7] Mr. Bonds was in my view and from the record evidence there in an official capacity. And while the facts may be different had Mr. Bonds gone and sat in the audience and participated as a member of the neighborhood or the community who made up the audience, he was there in another capacity, that is, as a program participant in a formal sort of way.

Now, as the court reviews the line of cases beginning with *Marquez-Turnock,* particularly at the district court levels judges like myself have honed in on this issue of whether or not the individual was speaking as a citizen or as a public employee. And if there be a bright line in these analyses, in my view it is quite clear that this case is not even close as to Mr. Bonds being there in the role of a city employee.

And it is one thing for participating in a forum such as this and with the blessing of the chairman of the block grant policy committee to talk about the analyses that were addressed in I believe it was Exhibit No. 11, to talk about the bare bones facts; but when those comments escalate to the comments that found their way into a *Milwaukee Journal Sentinel* article on Sunday, July 27th suggesting that the plan adopted by the Milwaukee Common Council on Friday, July 25th, was sinister and that those interested in taking a position ought to go to City

Hall and, quote, "raise hell" or to suggest that if the Mayor were to sign off on the proposal that he ought to be suitably subject to a recall petition goes [8] well beyond those comments that one would expect from a community employee with the City of Milwaukee who is actually employed in what can only be described as a policy position, a confidant, if you will, of those involved in the community block grant program, whether it be the committee of the Common Council or indeed the Common Council itself.

The court concludes from the credible evidence before me that the matters that were addressed in the *Journal Sentinel* article were substantially in keeping with the comments that were noted in quotes. I find nothing to suggest that the article as a whole was taken out of context. Indeed the apology to the Mayor addressed by Mr. Bonds in his testimony and memorialized in a June – strike that, July 28th, 1997 communication which is before the court as Exhibit 17, as well as a similar document sent to members of the Council, although certainly it does not present itself as an apology, in effect Mr. Bonds suggested that it was in his view along those lines as well as some clarifications.

Although there was some colloquy between counsel and the witness as to how it was he was present at the meeting and whether he would – would or would not have been there were it not for the fact that Alderman Gordon invited him to appear as a representative of the Milwaukee committee dealing with the block grant program as an analyst, that said, it does not in the court's view give Mr. Bonds the unfettered right to make [9] the comments that he did which in the eyes of his soon-to-be

employer, namely, Milwaukee County, raised all sorts of red flags, particularly against the backdrop of some of the matters that Mr. Hart testified about in terms of a scenario of what would be expected in terms of professionalism, et cetera.

And it is difficult for any fact-finder to conclude that based upon that interview that where things went so wrong in terms of Mr. Bonds being sensitive to the very issues that his new employer had raised, yet that colloquy did not find its way into Mr. Bonds' thinking, whether it be the heat of the moment in terms of being frustrated with what the Common Council did on Friday, whether it be aligning himself for some future course of action.

After all, Mr. Bonds is no babe in the woods when it comes to the hurly-burly of political life having run for public office himself knowing full well that you can't wear the political hat when you're doing in essence work in an analytical sense for a committee of the Common Council or the Milwaukee County Board. It would be no different were a judge's law clerk, for example, having spent time working on a particular matter for the court gone out to a Bar Association meeting and publicly castigated the court or the judge that he or she may have been working for for having taken a particular position or ruled in a particular manner on a particular case.

[10] Now, having said what I did with respect to the matter of Mr. Bonds being cast in the role here of an employee speaking on an issue as opposed to a [sic] ordinary citizen, I obviously would like to make a record in this case that also addresses the *Pickering* analysis

which is fundamentally where the court left off in its decision on summary judgment in April of last year.

While I believe this case in the final analysis ought to turn on the matter of Mr. Bonds' status in connection with the comments that were made at the Brainstorming Forum, the cases that I have cited, and there are a number of others beyond the Seventh Circuit, beyond *Marquez* and *Youker,* I am uncomfortable since the Seventh Circuit in both of those cases while acknowledging the proposition that I am finding to be very poignant and appropriate in this case did not in the final analysis base their decision solely on the fact that at the time the individual made the comments, he or she did so in the role of being a public employee as opposed to a private citizen which brings me to the matter of the *Pickering* analysis.

And in this respect I am also constrained to conclude that Mr. Bonds does not pass the test in terms of balancing Milwaukee County's interests in having a staff member, in this case an analyst for the County Board, whether it be on block grant programs or more effective utilization of human [11] resources or matters dealing with recreation in the county park system, whatever the task may be, these individuals employed as the various witnesses on both sides through the course of their testimony yesterday made crystal clear are entitled to have people in these positions who are reposed with a degree of confidence and trust by those charged with the responsibility of ultimately taking formal positions in the governance of the activities that may be before them.

And to be sure the comments that Mr. Bonds made in the context of the Brainstorming session caused considerable upheaval. Some might describe it as rancor and others would describe it as in light of these activities this is not someone that I could work with or could trust because of having taken a public position.

And while we are all entitled to our private opinions on anything or any subject, there does come a point in the context of public employees who are called upon to do particular tasks in government and to do so in a way that the employer in this case, the Chairman of the Milwaukee County Board, could repose her confidence in not only the ability but the exercise of good judgment and the ability to do his job in a manner that presents the facts as opposed to taking opinion or making his opinions known in a very broad sense with various community action groups.

Those frankly are left better for the roles of the elected [12] officials in terms of the politic of the position. And if it be truly Mr. Bonds' role to want to become more active in community activities, obviously there are other positions, whether it is elected officials, speech writers, what have you, that can and often do take more active roles in the community just as these individuals take active roles in the community when it comes to the matter of advocacy, whether it be lobbying for a particular group on a particular proposed piece of legislation or what have you.

But that is not the role that Mr. Bonds was cast in as a City of Milwaukee employee; and more importantly as related to the underlying facts of this case it is equally

important that the court take cognizance of not only what was on the County Board Chair's mind when it came to interviewing and selecting someone for the analyst position but within a matter of weeks if not days the very trust that the County was seeking in the person to fill the position was outright violated in terms of the comments that were made at this Brainstorming session resulting in Mr Bonds, as I've indicated, apologizing.

Although in some sense yesterday he tried to paint the article that appeared in the Sunday paper on July 27th as being distorted, et cetera, that is belied in my view by a more contemporaneous document, namely, Exhibit 18, with respect to the minor clarifications; and in light of the overall inflammatory nature of some of the comments, I find it [13] to be extremely minor in the large picture, as it were.

Accordingly, again I am constrained to adopt the proposed Conclusions of Law that were submitted by the defendant; and based on those findings as to facts and the law, I direct the clerk to enter a judgment finding that the defendant have and take nothing on his remaining claim against Milwaukee County and that the action as against Milwaukee County be and the same is herewith dismissed on its merits together with costs as taxed by the Clerk of the Court.

The court stands in recess.

(The proceedings concluded at 9:03 a.m.)

CERTIFICATE

I, Christine L. Petrie, Official Court Reporter, United States District Court, Eastern District of Wisconsin, do hereby certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

Dated this 20th day of April, 1999.

/s/ Christine L. Petrie
Christine L. Petrie, RMR
Official Court Reporter